COURT FILE NUMBER KBG-SA-00204-2023

COURT OF KINGS BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

APPLICANTS AFFINITY CREDIT UNION 2013 AND AFFINITY HOLDINGS INC.

RESPONDENT THE LIGHTHOUSE SUPPORTED LIVING INC.

IN THE MATTER OF AN APPLICATION FOR THE APPOINTMENT OF A RECEIVER OF THE ASSETS AND UNDERTAKINGS OF THE LIGHTHOUSE SUPPORTED LIVING INC. PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, SECTION 65(1) OF *THE QUEEN'S BENCH ACT 1998*, SS 1998, C Q-1.01, AND SECTION 64(8) OF THE *PERSONAL PROPERTY SECURITY ACT, 1993*, SS 1993, C P-62.

BRIEF OF LAW OF AFFINITY CREDIT UNION 2013

I. INTRODUCTION

1. The applicants, Affinity Credit Union 2013 ("ACU 2013") and Affinity Holdings Inc. ("AHI") (together the "**Credit Union**"), are secured creditors of the Respondent, The Lighthouse Supported Living Inc. (the "**Lighthouse**"). The Lighthouse is insolvent and is subject to an Order issued February 24, 2023 (the "**Interim Receivership Order**") is KBG-SA-00149-2023. The Credit Union applies for an order (the "**Proposed Receivership Order**") appointing MNP Ltd. as receiver pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [***BIA***], Section 65(1) of *The Queen's Bench Act, 1998,* SS 1998, c Q-1.01 [**QBA**] and Section 64(8) of *The Personal Property Security Act, 1993*, SS 1993, c P-62 [***PPSA***].

2. Following the practice of using template orders in receivership applications, the Credit Union has filed a redlined version of the Saskatchewan Template Proposed Receivership Order, thereby identifying the ways in which the requested Receivership Order differs from the Template Order that has been approved by the Insolvency Panel of the Court of Queen's Bench for Saskatchewan on December 6, 2017.

II. FACTS

3. The Credit Union relies primarily on the evidence set out in the following documents:
   (a) Affidavit of Judy du Chalard, sworn February 13, 2023 (the "**February Du Chalard Affidavit**"), and filed in KBG-SA-00149-2023; and
   (b) Affidavit of Megan Goodwin sworn February 23, 2023 (the "**Goodwin Affidavit**");
   (c) Supplemental Affidavit of Meagan Goodwin sworn February 23, 2023
   (d) Second Affidavit of Adeel Salman sworn February 23, 2023, and filed in KBG-SA-00149-2023;
   (e) Affidavit of Judy Du Chalard sworn April 5, 2023 (the "April Du Chalard Affidavit"); and
   (f) First Report of the Interim Receiver, MNP Ltd., dated April 5, 2023, filed in KBG-SA-00149-2023 (the "**Interim Receiver's Report**").

4. Unless stated otherwise, this Brief of Law adopts the abbreviated terms used in the February Du Chalard Affidavit.

5. The assets of the Lighthouse consist primarily of real property, including the following:
   (a) Two properties located in downtown Saskatoon, Saskatchewan; being an independent living tower (the "**Independent Tower**") and a supported living tower (the "**Supported Tower**");
   (b) Six rental properties located in Saskatoon, Saskatchewan (the "**Saskatoon Rental Properties**");
   (c) Three properties located in North Battleford, Saskatchewan (the "**North Battleford Properties**");
   (d) Nine parcels of located in the Rural Municipality of North Battleford No. 437 (the "**Blue Mountain Lands**")

6. The Lighthouse continues to provide affordable housing, supported living services and programming for vulnerable persons. There are approximately 76 people residing at the Independent Tower and another 64 people residing at the Supported tower.

7. The Credit Union's loans to the Lighthouse consist of:

   (a) the eight Mortgage Loans identified at Paragraph 8 of the Goodwin Affidavit;

   (b) a loan under the LRA as identified at Paragraph 5 of the February Du Chalard Affidavit; and

   (c) the line of credit account under the LOC Agreement as identified at Paragraph 5 of the February Du Chalard Affidavit.

8. The amount owing under the LRA represents the amount of the overdraft on the Lighthouse's chequing account with ACU 2013 as at January 12, 2023. Pursuant to the LOC Agreement, ACU 2013 advanced further funds to the Lighthouse commencing on January 12, 2023, in order to permit the Lighthouse to meet its operating expenses.

9. As at April 4, 2023, the total amount owing to the Credit Union under the Mortgage Loans, the LRA and the LOC Agreement was $2,616,530.92.

10. ACU 2013 and AHI have contractual rights to the appointment of a receiver. These contractual rights are established by Paragraph 12 of each of Mortgage 1-8, as identified at Paragraph 8 of the Goodwin Affidavit, and by Paragraph 10 of the GSA, as identified at Paragraph 12 of Goodwin Affidavit.

11. MNP Ltd. was appointed as interim receiver (the "Interim Receiver") of the assets and undertakings of the Lighthouse pursuant to the Interim Receivership Order. ACU 2013 advanced $100,000.00 to the Interim Receiver pursuant to an Interim Receiver's Certificate and a QL Agreement, as identified at Paragraph 6 of the April Du Chalard Affidavit.

12. As at December 31, 2022, the Lighthouse owed Canada Revenue Agency ("CRA") approximately $440,000.00 for unpaid employee source deductions, and this amount increased to approximately $561,000.00 as at April 5, 2023. The Lighthouse had accrued additional accounts payable to other creditors in the amount of approximately $578,000.00 prior to the appointment of the Interim Receiver on February 24, 2023.

13. The Interim Receiver's Report states (at para 83) that the projected cash loss for the Lighthouse is approximately $99,000.00 by April 13, 2023, and accordingly concludes (at para 96) that additional funding will be required for the Lighthouse to continue to offer its programmed services and to preserve and secure the assets of the Lighthouse.

14. Lisa McCallum has resigned as a Director of the Lighthouse, leaving four Directors. The remaining Directors are Twila Reddekopp, Jerome Hepfner, Don Windels and Adeel Salman.

III. ISSUES

15. The issue of whether the Lighthouse is insolvent is addressed at Paragraphs 6-7 of the Applicants' Brief of Law dated February 23, 2023, and this Brief of Law will accordingly address the following issues:

A. Is it just or convenient for this Honourable Court to appoint a receiver pursuant to Section 243(1) of the *BIA*?

B. Is it appropriate or convenient to appoint a receiver pursuant to Section 65(1) of the *QBA*?

C. Should this Honourable Court appoint a receiver pursuant to Section 64(8) of the *PPSA*?

16. For the reasons that follow, we respectfully submit that this Honourable Court should answer these questions in the affirmative.

IV. ARGUMENT

A. IS IT JUST OR CONVENIENT FOR THIS HONOURABLE COURT TO APPOINT A RECEIVER PURSUANT TO SECTION 243(1) OF THE *BIA*?

17. We submit that it is just or convenience for this Honourable Court to appoint a received pursuant to Section 243(1) of the *BIA*.

Applicable Legislation

18. Section 243(1) of the BIA provides that on application by a secured creditor a court may appoint a receiver where it is "just or convenient to do so" and provides the courts with broad discretion in determining the scope of the receiver's powers:

> **Court may appoint receiver**
>
> **243** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

Applicable Authorities

19. Following prior decisions in Ontario and Alberta, this Honourable Court in *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228 at para 19, 282 ACWS (3d) 773 [***Vortex Drilling***], stated that the following principles apply in determining whether the appointment of a receiver is "just or convenient" pursuant to s. 243(1) of the *BIA*:

(a) The courts must have regard to all of the circumstances, especially the nature of the property and the rights and interests of all parties in relation to the property;

(b) The fact that the applicant has a right under its security to appoint a receiver is an important factor to be considered, as is the question of whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently; and

(c) It is not essential that the applicant for a court-appointed receiver establish that it will suffer irreparable harm if a receiver is not appointed.

20. In *Vortex Drilling* at Paragraph 19, this Court further provided a non-exhaustive list of factors that will assist in determining whether the appointment of a receiver is just or convenient:

(a) Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) The nature of the property;

(d) The apprehended or actual waste of the debtor's assets;

(e) The preservation and protection of the property pending judicial resolution;

(f) The balance of convenience to the parties;

(g) The fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(h) The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) The principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

(j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

(k) The effect of the order upon the parties;

(l) The conduct of the parties;

(m) The length of time that a receiver may be in place;

(n) The cost to the parties;

(o) The likelihood of maximizing return to the parties; and

(p) The goal of facilitating the duties of the receiver.

21. Where a secured creditor applies for the appointment of a receiver and has a right to make such an application pursuant to a security document, the appointment of a receiver

is not an extraordinary remedy: *Business Development Bank of Canada v 2197333 Ontario Inc*, 2012 ONSC 965 at para 21, 212 ACWS (3d) 401.

22. In *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 at para 42, 235 ACWS (3d) 682 [***Sherco Properties***], the Ontario Superior Court accordingly stated that: "Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed."

23. Likewise, in *Maple Trade Finance Inc. v CY Oriental Holdings Ltd.*, 20009 BCSC 1527 at para 26, 182 ACWS (3d) 624 [***Maple Trade Finance***], the British Columbia Supreme Court has emphasized that a secured creditor's contractual right weighs heavily in favor of appointment: "The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver."

Application of the Law to the Facts

24. We respectfully submit that this Honourable Court should appoint a receiver pursuant to Section 243(1) of the *BIA*, as the same is just or convenient in the circumstances. Specifically, we rely on *Sherco Properties*, *Maple Trade Finance* and *Vortex Drilling* in support of the position that the Credit Union's contractual right to apply for a court-appointed receiver under Mortgages 1-8 the GSA weighs heavily in favour of the conclusion that the appointment of a receiver is both just and convenient.

25. To the extent that the Court finds it necessary to consider the additional specific factors outside of the contractual ones identified in *Vortex Drilling*, we respectfully submit that the other key factors are as follows:

(a) Factors (a)-(b)- Irreparable harm and risk to the Credit Union. Although it appears that the Credit Union is at present fully secured, there would be substantial risk to the Credit Union (and even risk of irreparable harm in view of the Lighthouse's insolvency) if a receiver were not appointed. The Credit Union has no confidence

in the management of the Lighthouse and would not continue to provide financing to allow the Lighthouse to meet its operating expenses in the absence of a Court-appointed receiver. If the Credit Union were to cease financing the Lighthouse and pursue its remedies of foreclosure and/ or sale, the Lighthouse would be unable to pay its employees and it is therefore difficult to see how the Lighthouse would be able to manage its properties, particularly the Independent Tower and the Supported Tower, in such circumstances. The Credit Union's security would be at risk. The Credit Union's security may also be at risk as a result of the unpaid employee source deductions in the amount of approximately $561,000.00 owing to CRA.

(b) Factor (e)- the preservation and protection of the Lighthouse's property pending judicial resolution. The stay of proceedings that forms part of the Proposed Receivership Order will protect and preserve the Lighthouse's property from its numerous creditors, enabling the Court-appointed receiver to focus on maintaining the books and records of the Lighthouse, supervising the day-to-day management of the Lighthouse's affairs, and make arrangements for the marketing and sale of assets to in order to reduce the Lighthouse's indebtedness.

(c) Factor (f)- the balance of convenience to the parties. The Lighthouse is financially dependent upon ACU 2013, as the Lighthouse can only meet its future operating expenses by way of further credit from ACU 2013. Yet, ACU 2013 has no obligation to continue to provide financing to the Lighthouse, and given that ACU 2013 is willing to provide financing pursuant to the Proposed Receivership Order, the balance of convenience should weigh in favour of granting the Proposed Receivership Order.

(d) Factor (k)- the effect of the order on the parties. The remaining four Directors of the Lighthouse are divided into two opposing camps- Twila Reddekopp and Jerome Hepfner on one side, and Don Windels and Adeel Salman on the other side. In these circumstances, the Lighthouse will be, in the absence of any receivership order, unable to make key decisions affecting the management of the Lighthouse and the disposition of its assets. Thus, the Proposed Receivership Order will not negatively effect the management of the Lighthouse.

B. IS IT APPROPRIATE OR CONVENIENT TO APPOINT A RECEIVER PURSUANT TO SECTION 65(1) OF THE *QBA*?

26. For the reasons that follow, we respectfully submit that it is appropriate or convenient to appoint a receiver pursuant to Section 65(1) of the *QBA*.

27. Section 65(1) of the *QBA* provides that:

> **Interlocutory mandamus, injunction or appointment of receiver**
>
> **65**(1) A judge may, on an interlocutory application, grant a mandamus or an injunction or appoint a receiver where it appears to the judge to be **appropriate or convenient** that the order should be made.
>
> [Emphasis added]

28. We respectfully submit that where it is "just or convenient" to appoint a receiver under Section 243(1) of the *BIA* (which, as set out above, it is also "appropriate or convenient" to appoint a receiver under Section 65(1) of the *QBA*, and that in this case it is therefore "appropriate or convenient" for this Honourable Court to appoint a receiver pursuant to s. 65(1) of the *QBA*.

C. SHOULD THIS HONOURABLE COURT APPOINT A RECEIVER PURSUANT TO SECTION 64(8) OF THE *PPSA*?

29. For the following reasons, we respectfully submit that this Honourable Court should appoint a receiver pursuant to Section 64(8) of the *PPSA*.

30. Section 64(8) of the *PPSA* provides that:

> **Receivers**
>
> **64**(8) On application by an interested person, the court may:
>
> (a) appoint a receiver;
>
> [...]

31. The Credit Union is clearly an interested person within the meaning of Section 64(8) of the *PPSA*, as set out above, in relation to its loans to the Lighthouse and security for repayment of such loans obtained from the Lighthouse. For the same reasons that it is "just or convenient" to appoint a receiver under Section 243(1) of the *BIA* and it is "appropriate or convenient" to appoint a receiver under Section 65(1) of the *QBA*, it is appropriate for the Court to appoint a receiver pursuant to Section 64(8) of the *PPSA*.

V. RELIEF REQUESTED

32. For all of these reasons, the Credit Union respectfully requests that this Honourable Court grant an order appointing MNP Ltd. as the receiver of the assets and undertakings of the Lighthouse pursuant to Section 243(1) of the *BIA,* Section 65(1) of the *QBA* and Section 64(8) of the *PPSA*, and in accordance with the terms of the Proposed Order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Saskatoon, Saskatchewan, this 16th day of April, 2023.

LELAND KIMPINSKI LLP

Per: _____

Ryan A. Pederson, counsel for the applicants, Affinity Credit Union 2013 and Affinity Holdings Inc.

VI. TABLE OF AUTHORITIES

1. *Affinity Credit Union 2013 v Vortex Drilling Ltd.*, 2017 SKQB 228, 282 ACWS (3d) 773.

2. *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023, 235 ACWS (3d) 682.

3. *Business Development Bank of Canada v 2197333 Ontario Inc*, 2012 ONSC 965, 212 ACWS (3d) 401.

4. *Maple Trade Finance Inc. v CY Oriental Holdings Ltd.*, 2009 BCSC 1527, 182 ACWS (3d) 624.

TAB 1

C Affinity Credit Union 2013 v. Vortex Drilling Ltd.
2017 SKQB 228, 2017 CarswellSask 399 | Saskatchewan Court of Queen's Bench | Saskatchewan | July 24, 2017 *(Approx. 18 pages)*

Affinity Credit Union 2013 v. Vortex Drilling Ltd.

2017 CarswellSask 399, 2017 SKQB 228, 282 A.C.W.S. (3d) 773, 50 C.B.R. (6th) 220, 7 P.P.S.A.C. (4th) 195

AFFINITY CREDIT UNION 2013 (PLAINTIFF) and VORTEX DRILLING LTD. (DEFENDANT)

AMENDED

IN THE MATTER OF THE SASKATCHEWAN BUSINESS CORPORATIONS ACT, RSS 1978, c B-10

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF VORTEX DRILLING LTD.

B. Scherman J.

Judgment: July 24, 2017
Docket: Saskatoon QBG 783/17, 1030/17

Counsel: Jeffrey M. Lee, Q.C., Paul D. Olfert, for Affinity Credit Union and Radius Credit Union
Mary I.A. Buttery, Jared Enns, for Vortex Drilling
Ian A. Sutherland, Jordan F. Richards, for Receiver
Brent Warga, for Interim Receiver
P. Koliaskis, for Proposed Monitor

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

IV Receivers
IV.1 Appointment

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.E Miscellaneous

Headnote

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Defendant company (V Ltd.) was in business of drilling oil wells and was hit hard by price drop of oil — In 2013, plaintiff financial institution (A Co.) advanced V Ltd. nearly $15 million to refinance two drilling rigs and to purchase third — While loan facilities were repayable on demand, prior to demand there was schedule of combined monthly interest and principal payments — Credit agreement also provided that any material change in risk or adverse change in financial condition of V Ltd. would constitute default — After oil prices collapsed, V Ltd. could not make its scheduled payments and A Co. agreed on several occasions to allow V Ltd. to defer principal payments — V Ltd. then failed to make negotiated balloon principal payments and in January 2017 failed to resume regular monthly principal and interest payments as V Ltd. had undertaken to do — A Co. demanded payment in May 2017, allowing V Ltd. 30 days to pay in full — A Co. applied for appointment of receiver; V Ltd. applied for

affidavits filed by Affinity and to bring its own application for *CCAA* relief. In the circumstances I ordered the appointment of an interim receiver for a period ending July 23, 2017 under which the interim receiver could investigate, monitor and facilitate Vortex's continuing operation so as to give Vortex an opportunity to file opposition affidavits and make its *CCAA* application.

16 That application and the affidavit evidence of both Vortex and Affinity on both applications are before me. As stated above, Vortex is insolvent, in the sense of being unable to pay its debts as they become due. The issue to be decided is whether in the circumstances the appointment of a Receiver or an initial order under the *CCAA* is most appropriate in the circumstances.

The Law Respecting CCAA Applications

17 Jurisprudence establishes that the following principles are applicable to *CCAA* applications:

a. The legislative purpose of the *CCAA* is to permit qualifying debtors to carry on business and where possible avoid the social and economic costs of liquidating its assets: See *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15, [2010] 3 S.C.R. 379 (S.C.C.) [*Century*].

b. The remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business: See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), [1991] 2 W.W.R. 136 (B.C. C.A.).

c. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* jurisdiction: *Century* at para 70.

d. Appropriateness is assessed by inquiring whether the order sought advances the remedial purpose of the *CCAA*: *Century* at para 70

e. Section 11.02(3)(a) of the *CCAA* states that the court shall not grant a stay of proceedings unless:

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate...

18 I proceed on the basis that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence.

The Law Respecting Receivership Applications

19 In a previous unreported decision in *Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc.* [2016 CarswellSask 607 (Sask. Q.B.)]. (25 February 2016) Saskatoon, QB 1639 of 2015, I summarized jurisprudence with respect to applications to appoint a receiver under s. 243 of the *BIA*. I repeat here that summary, which I view as remaining accurate:

5. Under s. 243(1) of the *BIA* this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd.* 2011 ONSC 1007 *and Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.* 2013 ABQB 63.

6. In Carnival the court said the following regarding the just and convenient criteria at para 24 of its reason:

> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
> > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374;*Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399*; Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

7. In *Kasten* the court said the following:

> 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27,

(2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

20 Consistent with my view that a *CCAA* applicant bears the burden of establishing each of the requirements of appropriateness, good faith and due diligence, I am of the view that an applicant under s. 243 of the *BIA* bears the burden of satisfying the Court that it would be just and convenient to appoint a receiver in the circumstances.

The Parties' Positions in Brief

21 Vortex's position is that on a proper application of the legislative and remedial purposes of the *CCAA* it is appropriate to issue an initial order and grant a stay. It argues that putting Vortex into receivership is going to result in liquidation of its assets and the end of its business with the resulting loss of employment for many individuals as well as the loss of the other economic activity that Vortex generates in its home community.

22 Vortex says that the economic climate in the Western Canadian oil industry is improving and it is expecting a substantial improvement in its cash flow. It says it expects to soon secure additional business and that it is actively pursuing promising refinancing opportunities. Thus it says it is appropriate that it be given an opportunity to pursue such refinancing or a compromise with its creditors so as to avoid the social and economic costs of liquidation. It says that the security that Affinity holds has a value significantly beyond the debt owed by it, and there will be no real prejudice to Affinity by granting an initial order and granting a stay.

23 Affinity says the proper and appropriate order in the circumstances is the receivership order it seeks. It says that Vortex is insolvent, it has the contractual right to appoint a receiver or seize and sell the rigs upon an event of default (which both insolvency and failure to pay the debt owed are), it has already provided Vortex with lengthy and significant accommodations and for good and sufficient cause it has lost trust in Vortex. Affinity says Vortex has repeatedly failed to honour contractual commitments made to Affinity in return for the deferrals granted and that the evidence demonstrates that Vortex has not acted in good faith.

TAB 2

C Bank of Montreal v. Sherco Properties Inc.
2013 ONSC 7023, 2013 CarswellOnt 16848 | Ontario Superior Court of Justice [Commercial List] | Ontario | December 3, 2013 *(Approx. 9 pages)*

Bank of Montreal v. Sherco Properties Inc.

2013 CarswellOnt 16848, 2013 ONSC 7023, 235 A.C.W.S. (3d) 682

Bank of Montreal, Applicant and Sherco Properties Inc., Sherk Farm Limited, Cosher Properties Inc., and Donald Sherk, Respondents

Heard: November 4, 2013
Judgment: December 3, 2013
Docket: CV-13-10244-00CL

Counsel: S.D. Thom, for Applicant
R.B. Moldaver, Q.C., for Respondents

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure; Property

Related Abridgment Classifications

Bankruptcy and Insolvency

IV Receivers
IV.1 Appointment

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.C Mortgagee

Headnote

Bankruptcy and Insolvency — Receivers — Appointment

S Inc. was principal debtor in connection with series of loan facilities extended by bank — Both S Inc., as principal debtor, and S Ltd., as guarantor, had granted general security agreements to bank in respect of indebtedness of S Inc. — S and defendant C Inc. had each executed guarantees of indebtedness of S Inc. as well as providing other security — Money had been provided to S Inc. to fund property development project — Bank did not intend to provide further funds for project and defendants had been unable to find alternative funding or sell properties to repay bank — Interest was accruing and property taxes for properties were in arrears — Application by bank for appointment of receiver in respect of S Inc. and S Ltd., both of which were owned by defendant S; bank also sought receivership order in respect of two residential properties owned by S pursuant to receivership clauses in mortgages held by bank — Application granted — Terms of security held by bank in respect of S Inc. and S Ltd. permitted appointment of receiver — Terms of mortgages permitted appointment of receiver upon default — Value of security continued to erode as interest and tax arrears continued to accrue — S had been unable to accomplish refinancing or sale of properties — It was appropriate to appoint receiver to arrange sale of properties.

Debtors and creditors — Receivers — Appointment — Application for appointment — Person entitled to make application — Mortgagee

S Inc. was principal debtor in connection with series of loan facilities extended by bank — Both S Inc., as principal debtor, and S Ltd., as guarantor, had granted general security agreements to bank in respect of indebtedness of S Inc. — S and defendant C Inc. had each executed guarantees of indebtedness of S Inc. as well as providing other security — Money had been provided to S Inc. to fund property development project — Bank did not intend to provide further funds for project and defendants had been unable to find alternative funding or sell properties to repay bank — Interest was accruing and property taxes for properties were in arrears — Application by bank for appointment of receiver in respect of S Inc. and S Ltd., both of which were owned by defendant S; bank also sought receivership order in respect of two residential properties owned by S pursuant to receivership clauses in

35 In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

36 From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

37 Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

38 The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

39 Section 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers to be just or convenient to do so:

> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

40 Section 101 of the *Courts of Justice Act* states:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or a receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

41 In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]).

42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

43 Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Sask. Q.B.) where Estey J. (as he then was) reasoned as follows:

> ...that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

44 Similar comments were stated in *Royal Bank v. White Cross Properties Ltd.* (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.).

45 Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

46 Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

47 I have reached this conclusion for the following reasons:

> (a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
>
> (b) the terms of the mortgages permit the appointment of a receiver upon default;
>
> (c) the value of the security continues to erode as interest and tax arrears continue to accrue;

TAB 3

C **Business Development Bank of Canada v. 2197333 Ontario Inc.**
2012 ONSC 965, 2012 CarswellOnt 2062 | Ontario Superior Court of Justice [Commercial List] | Ontario | February 15, 2012 *(Approx. 6 pages)*

Business Development Bank of Canada v. 2197333 Ontario Inc.

2012 CarswellOnt 2062, 2012 ONSC 965, 212 A.C.W.S. (3d) 401, 94 C.B.R. (5th) 28

Application under Subsection 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Business Development Bank of Canada, Applicant and 2197333 Ontario Inc., Respondent

Morawetz J.

Heard: January 23, 2012
Judgment: February 15, 2012
Docket: CV-11-9496-00CL

Counsel: Ian A. Aversa for Applicant, Business Development Bank of Canada
R.B. Moldaver, Q.C. for Respondent, 2197333 Ontario Inc.
Rosemary A. Fischer for Proposed Receiver, Fuller Landau Group Inc.

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and Insolvency

IV Receivers
IV.1 Appointment

Debtors and creditors

VII Receivers
VII.2 Jurisdiction of court to appoint

Headnote

Bankruptcy and insolvency — Receivers — Appointment

Respondent was real estate holding company with no assets other than property — Mortgage over property provided applicant bank with ability to seek appointment of court-appointed receiver in event of default by respondent — Respondent defaulted — Applicant's security became enforceable — Applicant made demand and gave notice of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act (BIA) — Applicant brought application for appointment of receiver under s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Appointment of receiver was justified in present case — There had been default — There was contractual remedy provided for in mortgage that contemplated appointment of receiver — As such, relief could not be seen to be extraordinary in nature — Respondent had been in default for considerable period of time — Lack of operating business established that there was no prejudice to debtor that was directly related to appointment.

Debtors and creditors — Receivers — Jurisdiction of court to appoint

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — followed

National Trust Co. v. Yellowvest Holdings Ltd. (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.) — considered

8 Turning to the merits, the Respondent is a single-purpose real estate holding company. It has no employees and no active business. The Respondent owns a property at 330 Oakdale Road, Toronto (the "Oakdale Premises"). The Respondent's tenant is bankrupt. The Respondent is in default of its obligation to BDC and BDC's security has become enforceable.

9 Demand was made on May 17, 2011. The demand was accompanied by a Notice of Intention to Enforce Security pursuant to s. 244 (1) of the *BIA*.

10 The Respondent is indebted to BDC in the amount of approximately $2.5 million.

11 The mortgage agreement provides that following an event of default, BDC is entitled to apply to court to seek the appointment of a receiver.

12 BDC also raised issues concerning the ability of the Respondent to make payments for heat, hydro and security. However, subsequent to the issuance of the application, it appears that the Respondent made adequate arrangements with respect to these items.

13 A representative of the Respondent, Mr. Santaguida, raised a number of allegations that there are environmental issues affecting the Oakdale Premises. Counsel to the Respondent takes the position that, in the event that the Oakdale Premises have any environmental issues, Mr. Santaguida will be causing the Respondent and the other borrowers to commence proceedings against BDC.

14 Section 101 of the *CJA* and s. 243 of the *BIA* provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

15 Counsel to BDC submits that a receiver should be appointed for the following reasons:

(a) the credit agreement is in default;

(b) the indebtedness is not in dispute;

(c) there has been a loss of confidence in management and the debtor has shown a flagrant disregard for the secured position of BDC in view of the continued accrual of interest; and

(d) the Respondent is merely a holding company and has no other assets, lines of business or any reasonable prospects for future solvency.

16 Counsel to BDC also takes the position that the court should not interfere with the rights derived by private contract and, in this case, the mortgage provides BDC with the ability to seek the appointment of a court-appointed receiver. Counsel contends that, as the Respondent's default has not been cured, it is unjust to deny BDC the remedy of a court administration (See *Bank of Montreal v. Appcon Ltd.* (1981), 37 C.B.R. (N.S.) 281 (Ont. H.C.), at 286; and *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]).)

17 In addition, counsel referenced *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) at para. 75 where it is stated:

> The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

18 Finally, counsel submits that the appointment of a receiver is justified in order to protect to stakeholders and that it is the optimal enforcement mechanism in this case.

19 Counsel for the Respondent contends that there is no basis for the appointment of a receiver and that there are other ordinary legal remedies available that the Applicant could pursue. The Respondent also contends that there is no evidence that the Oakdale Premises are in jeopardy and that urgency has not been demonstrated. Counsel contends that there is no evidence to suggest that the appointment of a receiver is necessary without the court's intervention. Counsel further submits that the court should not intervene in the circumstances by giving the extraordinary remedy of appointing a receiver.

20 In argument, counsel to the Respondent indicated that the debtor does intend to take proceedings against BDC and that the principal has a limited guarantee involved. In these circumstances, counsel submits that BDC should not get the additional protection of having a court-appointed receiver.

21 Having considered the positions put forth by both sides, it seems to me that the appointment of a receiver, in this case, is justified. There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment. The submissions of counsel (as to BDC as set out at [15] - [18]) in this respect, are persuasive.

22 The Receiver will, in all likelihood, be seeking directions from the court on a periodic basis. The Respondent can raise appropriate issues in respect of the receivership on the return of such motions.

TAB 4

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.
2009 BCSC 1527, 2009 CarswellBC 2982 | British Columbia Supreme Court [In Chambers] | British Columbia | September 21, 2009 *(Approx. 7 pages)*

2009 BCSC 1527
British Columbia Supreme Court [In Chambers]

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.

Maple Trade Finance Inc. (Plaintiff) And CY Oriental Holdings Ltd. (Defendant)

D.M. Masuhara

Heard: September 21, 2009
Oral reasons: September 21, 2009
Written reasons: Septembet 23, 2009
Docket: Vancouver S095413

Counsel: J.J.L. Hunter, Q.C., B.R.H. Johnston for Plaintiff
P.J. Reardon for Defendant

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient

Headnote

Debtors and creditors — Receivers — Appointment — Application for appointment — Grounds

Creditor provided accounts and receivable financing and debtor was holding company — Creditor and debtor entered into financing agreement — Debtor executed general security agreement in favour of creditor providing that creditor could appoint receiver of collateral in event of default — Debtor defaulted on loan — Creditor brought application for appointment of receiver and manager over debtor's current and future assets undertaking in properties, including all proceeds — Debtor ordered to pay creditor $1,016,019 plus non-default interest, and remaining outstanding balance plus non-default interest over four months in equal instalments — Any default in payment not cured within three days would lead to automatic appointment of receiver — Applicable test was whether it was just and convenient to make order sought — Fact that finance agreement acknowledged right of creditor to make application for receiver was strong factor in support of imposition of receiver — However, debtor proposed to repay significant amount and recent payments made by debtor were not insignificant — Proposal aligned with factor of controlling costs and likelihood of maximizing return to parties — Concern existed with debtor's ability to make good on its payments — Balancing factors, order that would have automatic imposition of receiver upon default addressed concerns.

Table of Authorities

Cases considered by *D.M. Masuhara*:

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — followed

Statutes considered:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

26 The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver.

27 However, on the other hand, there is a proposal by the defendant to repay a significant amount which was further expanded during the hearing by defendant's counsel. This lends support to the defendant's position. I note as well, the more recent payments made by the defendant to the plaintiff are not insignificant, as well as Mr. Gee's statement that since the summer of 2006, the amounts advanced by the plaintiff are in the order of $7.6 million and that repayments through August 2009 have been in the order of $5,238,766. I recognize that interest has been accruing on the principal.

28 The proposal as explored and discussed during the course of the hearing would align with the factor of controlling the costs to the parties at this point. It would also, align with the likelihood of maximizing return to the parties.

29 If the company's condition as to its viability was accepted, this would deal in part with the plaintiff's concern regarding jeopardy. The difficulty is the confidence that one can have in the defendant's ability to make good on its payments. Mr. Hunter, stated the concern really is not as much to do with the promise, but more to do with performance. I would agree.

30 However, balancing the factors, an order that would have the automatic imposition of a receiver, upon default in any payment required by the defendant, would address the concerns at this point. I think the balance of convenience can further be achieved through a further modification of the defendant's proposal to reflect the concerns over the lack of financial information to support the contention regarding the financial strength of the operating companies.

31 To that extent, the payments will be made in this manner: the defendant is to pay the plaintiff on or before the 28th of September, 2009, the sum of $1,016,019 plus non-default interest.

32 MR. REARDON: Sorry, My Lord, because I'm not familiar, would you mind repeating that number.

33 THE COURT: Okay. $1,016,019.

34 MR. REARDON: Yes, thank you.

35 THE COURT: $1,016,019 plus non-default interest. The defendant is to pay the plaintiff, over four months, the remaining outstanding balance plus non-default interest in equal installments.

36 The defendant will also provide financial statements related to its company and operations, including its wholly owned subsidiaries. Mr. Chen's shares will be delivered as security to the plaintiff.